

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

Common Cause Minnesota,

Complainant,

vs.

**ORDER ON RESPONDENTS' MOTION  
FOR SUMMARY DISPOSITION AND  
MOTION TO DISMISS**

Republican Party of Minnesota, Tony  
Sutton, Ron Huettl, Count Them All  
Properly, Inc., Mary Igo, Tom Datwyler,  
Fred Meyer, and Dan Puhl,  
Respondents.

The above-entitled matter is pending before the Panel of Administrative Law Judges. The Respondents filed a Motion to Dismiss (which the Panel has determined should be treated as a Motion for Summary Disposition) on August 15, 2012, and a separate Motion to Dismiss on August 16, 2012.<sup>1</sup> The Complainant filed a response in opposition to these motions on September 4, 2012. The Respondents filed reply briefs in support of the motions on September 14, 2012.<sup>2</sup>

Diane P. Gerth, Attorney at Law, Ricke & Sweeney, P.A., represented Common Cause Minnesota (Complainant or Common Cause).

Richard G. Morgan and Nathan J. Marcusen, Attorneys at Law, Bowman and Brooke, LLP, represented Respondent Republican Party of Minnesota (RPM).

Douglas A. Kelley, Steven E. Wolter, and Kevin M. Magnuson, Attorneys at Law, Kelley, Wolter & Scott, P.A., represented Respondent Tony Sutton.

Charles R. Shreffler, Attorney at Law, Shreffler Law, PLLC, represented Respondent Ronald Huettl.

John Hugh Gilmore, Attorney at Law, Gilmore Law Offices, represented Respondents Count Them All Properly, Inc., Mary Igo, Fred Meyer, Tom Datwyler, and Dan Puhl.

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<sup>1</sup> All of the Respondents have joined in the Motion for Summary Disposition filed by Respondent Republican Party of Minnesota on August 15, 2012, and the Motion to Dismiss filed by Respondent Ronald Huettl on August 16, 2012.

<sup>2</sup> All of the Respondents joined in the reply briefs that were filed by the Republican Party of Minnesota and Ronald Huettl on September 14, 2012.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the attached Memorandum, the assigned Panel of Administrative Law Judges makes the following:

### **ORDER**

#### **IT IS ORDERED as follows:**

1. Respondents' Motion for Summary Disposition is **DENIED**.
2. Respondents' Motion to Dismiss is **DENIED**.
3. To the extent necessary, this matter shall proceed to an evidentiary hearing on a date to be determined. In light of the filing of motions by the parties, the motion briefing schedule to which the parties agreed, and the non-expedited nature of this dispute, the Panel finds that there is good cause within the meaning of Minn. Stat. § 211B.35, subd. 1, to schedule the hearing for a date convenient to all parties that is more than 90 days after the complaint was filed.
4. The parties shall, by October 24, 2012, inform the Panel of all dates between October 29 and December 20, 2012, on which they are available for hearing, and notify the Panel whether they believe an evidentiary hearing is necessary or if this matter can be decided on written submissions.

Dated: October \_\_\_\_\_, 2012

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BARBARA L. NEILSON  
Presiding Administrative Law Judge

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CHERYL LECLAIR- SOMMER  
Administrative Law Judge

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RICHARD C. LUIS  
Administrative Law Judge

## MEMORANDUM

On July 20, 2012, Common Cause Minnesota filed a Complaint with the Office of Administrative Hearings under the Fair Campaign Practices Act.<sup>3</sup> In its Complaint, Common Cause alleges that the Respondents, Count Them All Properly, Inc. (CTAP), a Minnesota corporation, Mary Igo, as CEO of CTAP, Tom Datwyler, as secretary and board member of CTAP, Fred Meyer, as a board member of CTAP, Dan Puhl, as the original incorporator of CTAP, the Republican Party of Minnesota (RPM), Tony Sutton, as RPM's Chair, and Ron Huettl, as RPM's finance director, violated Minn. Stat. § 211B.15 by making corporate contributions to the RPM in violation of Subdivision 2 of that statute, or by aiding, abetting or advising the making of such a prohibited contribution in violation of Subdivision 13. The Complaint alleges that the contributions were made to cover costs incurred by the RPM in connection with its 2010 gubernatorial recount effort.<sup>4</sup>

Minn. Stat. § 211B.15, subd. 2, prohibits corporations from making contributions to a major political party or individual to promote or defeat the candidacy of an individual for election to a political office in Minnesota. Specifically, subdivision 2 states:

[a] corporation may not make a contribution or offer or agree to make a contribution directly or indirectly, of any money, property, free service of its officers, employees, or members, or thing of monetary value to a major political party, organization, committee, or individual to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office. For the purpose of this subdivision, "contribution" includes an expenditure to promote or defeat the election or nomination of a candidate to a political office that is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of, a candidate or committee established to support or oppose a candidate but does not include an independent expenditure authorized by subdivision 3.

An expenditure is considered to be independent if it is "made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal

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<sup>3</sup> Minn. Stat. §§ 211B.01 – 211B.37.

<sup>4</sup> The Complaint also alleged that Respondents Sutton and Huettl violated Minn. Stat. § 211B.06 by failing to keep a correct account of monies received with the intent to conceal receipts or disbursements, the purpose of the receipts or disbursements, or the existence or amount of an unpaid debt. On July 25, 2012, the Presiding Administrative Law Judge determined that the Complaint did not allege a *prima facie* violation of Minn. Stat. § 211B.06, and dismissed that claim. As a result, only the alleged violation of Minn. Stat. § 211B.15 remains at issue in this proceeding.

campaign committee or agent.”<sup>5</sup> “Corporation” is defined to mean: “(1) a corporation organized for profit that does business in this state; (2) a nonprofit corporation that carries out activities in this state; or (3) a limited liability company formed under Chapter 322B, or under similar laws of another state, that does business in this state.”<sup>6</sup> Based upon the information from the Minnesota Secretary of State’s website attached to the Complaint, it appears that CTAP is a corporation as defined in the statute.<sup>7</sup>

Minn. Stat. § 211B.15, subd. 13, specifies that an individual who aids, abets, or advises a violation of section 211B.15 is guilty of a gross misdemeanor.

## Background

On January 4, 2012, approximately 6½ months before the filing of the Complaint that is the subject of this matter, Common Cause of Minnesota filed a complaint with the Minnesota Campaign Finance and Public Disclosure Board (Campaign Finance Board or Board). In that complaint, Common Cause alleged that the Republican Party of Minnesota had violated certain requirements of the Campaign Finance and Public Disclosure Act set forth in Minnesota Statutes Chapter 10A by “funneling over \$719,000 in legal fees related to the gubernatorial recount from unknown sources through a shell company called Count Them All Properly.”<sup>8</sup> Common Cause asserted that the RPM thereby “circumvented the statutorily-required disclosure of these contributions, and it failed to properly report the contribution.”<sup>9</sup> Common Cause further alleged in its complaint that the RPM failed to receive written authorization from the RPM treasurer<sup>10</sup> and that it had filed a false statement with the Board by omitting from its 2010 Report of Receipts and Expenditures numerous expenditures for the legal fees and copying costs associated with the recount, failing to disclose the contributions that were received from CTAP, Inc., and failing to maintain required records.<sup>11</sup> In making its complaint to the Board, Common Cause relied on several media reports that were issued in February, May, June, and December of 2011.<sup>12</sup> It urged the Board to conduct a full audit of RPM’s financial records and impose the maximum penalties permitted by law.<sup>13</sup>

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<sup>5</sup> Minn. Stat. § 10A.01, subd. 18.

<sup>6</sup> Minn. Stat. § 211B.15, subd. 1.

<sup>7</sup> Complaint, Ex. D.

<sup>8</sup> Complaint filed with Campaign Finance Board (attached to Affidavit of Diane Gerth as Ex. B), at 1.

<sup>9</sup> *Id.* at 1-5.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.* at 6-8

<sup>12</sup> *Id.* at 1-8. The complaint referred to a report by Tom Scheck on Minnesota Public Radio on Feb. 1, 2011, regarding RPM’s announcement that Count Them All Properly, Inc. had been created for the recount efforts and would not disclose the amount of money raised or by whom; an article by Josh Moniz, “Brown County still awaits GOP payment for recount,” The New Ulm Journal (May 2, 2011); an article by Baird Helgeson, “GOP still owes some counties for recount,” Star Tribune (May 28, 2011); an article by Patrick Anderson, “GOP still owes counties for 2010

The Campaign Finance Board conducted an investigation during which it issued multiple requests for documents and took depositions of 13 individuals. On July 13, 2012, the Board issued its Findings and Order regarding the complaint. In its Findings and Order,<sup>14</sup> the Board determined, among other things, that:

- Attorneys from the three law firms contacted to work on the 2010 gubernatorial recount (Trimble and Associates, Briggs and Morgan, and Bryan Cave) understood that they were working for the RPM. After CTAP was formed, the law firm of Trimble and Associates had Mr. Sutton sign a guaranty agreement confirming that the RPM was responsible for its fees. Based on all of the evidence developed in its investigation, the Board concluded that at the time the attorneys began their work on the recount and throughout the duration of that work, they were working under agreements with the RPM that made the RPM liable for their fees;<sup>15</sup>
- Registration of CTAP, Inc., was completed on December 3, 2010, five days before Tom Emmer conceded the gubernatorial election. CTAP never engaged any attorney for recount purposes, never incurred any financial obligations to county auditors, and never conducted any recount activity. CTAP received only one \$30,000 donation from one individual, and deposited the contribution on February 8, 2011. In March 2011, the RPM asked the three law firms to re-issue their invoices in the name of CTAP, and they did so. On April 16, 2011, and May 20, 2011, CTAP made three payments of \$9,000 each to the three law firms. Because these fees were obligations of the RPM and CTAP's payment relieved the RPM of a portion of its financial obligation, the Board concluded that CTAP thereby made in-kind contributions to the RMP in the total amount of \$27,000;<sup>16</sup>
- Because CTAP existed for the major purpose of making contributions to the RPM in the form of payments for recount

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recount," Winona Daily News (June 1, 2011); an article by Don Davis, "Slow, but sure, GOP says it is repaying counties for recount," Fargo Forum (June 7, 2011); an article by Paul Demko and Briana Bierschbach, "Sutton admits signing agreement for gov recount legal fees, failing to tell other party officials," *Politics in Minnesota* (Dec. 7, 2011); comments made by Mike Vekich during a press conference (Dec. 11, 2011); an article by Tom Scheck, "Sturrock resigns as Secretary-Treasurer of the MNGOP," MPR News (Dec. 30, 2011); and an article by Baird Helgeson, "State GOP \$2 million in debt," Star Tribune (Dec. 30, 2011).

<sup>13</sup> *Id.* at 8-9.

<sup>14</sup> Findings and Order of Campaign Finance Board (July 13, 2012) (attached to Affidavit of Diane Gerth as Ex. A).

<sup>15</sup> *Id.* at 4, 5, 25.

<sup>16</sup> *Id.* at 18-23, 25.

costs that were RPM's obligations, it meets the definition of a "political committee" under Minn. Stat. § 10A.01, subd. 27, but failed to register as such;<sup>17</sup>

- The RPM failed to maintain records that would provide in sufficient detail the necessary information from which the RPM's filed campaign reports and statements could be verified, explained, clarified, and checked for accuracy and completeness. However, this failure resulted from the indifference or ineffectiveness of the officers, staff, and contractors of the RPM and not from an intentional or "knowing" violation;<sup>18</sup> and
- Both regular and recount expenditures were made in 2010 without sufficient financial controls to constitute treasurer authorization;<sup>19</sup>
- The recount legal fees and other unpaid obligations of the RPM were omitted from the RPM's 2010 reports of receipts and expenditures. Unpaid obligations were also omitted from the RPM's 2009 report. However, the RPM's treasurer signed and certified these reports without knowledge that required information was omitted.<sup>20</sup>

Based on these and other findings, the Board imposed civil penalties on the RPM, CTAP and officers of RPM for violating requirements in Chapter 10A of the Minnesota Statutes.<sup>21</sup>

One week after the Board issued its decision, Common Cause filed the Chapter 211B Complaint at issue in this proceeding. Common Cause maintains in its Complaint that CTAP's contributions to the RPM violate the prohibition against corporate contributions to major political parties set forth in Minn. Stat. § 211B.15. Common Cause is seeking a referral to the appropriate county attorney's office for criminal prosecution of the Respondents as permitted under Minn. Stat. § 211B.35.<sup>22</sup>

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<sup>17</sup> *Id.* at 23-24, 26.

<sup>18</sup> *Id.* at 5-7, 25.

<sup>19</sup> *Id.* at 7-10, 25.

<sup>20</sup> *Id.* at 10-17, 25-26.

<sup>21</sup> *Id.* at 26-27.

<sup>22</sup> Complaint filed with OAH at 4.

## **I. Timeliness of the Complaint**

### **Respondents' Motion**

The Fair Campaign Practices Act sets forth a one-year limitation period for the filing of complaints alleging a violation of the Act, with certain exceptions. Minn. Stat. § 211B.32, subd. 2, states:

The complaint must be filed with the [Office of Administrative Hearings] within one year after the occurrence of the act or failure to act that is the subject of the complaint, except that if the act or failure to act involves fraud, concealment, or misrepresentation that could not be discovered during that one-year period, the complaint may be filed with the office within one year after the fraud, concealment, or misrepresentation was discovered.

Respondents assert that the Complaint filed by Common Cause with the OAH must be dismissed as a matter of law because it is time-barred. They claim that the conduct complained of by Common Cause occurred in 2010, when CTAP was formed for the purposes of paying the recount expenses, and point out that the Complaint was not filed until nineteen months later. The Respondents also assert that the one-year limitations period has not been tolled under Minn. Stat. § 211B.32, subd. 2, because (1) Common Cause did not plead facts in its Complaint to support tolling of the limitations period or allege fraud, concealment, or misrepresentation; and (2) the Respondents did not in fact engage in fraud, concealment, or misrepresentation and, as a result, the actions of the RPM and CTAP could have been discovered within the one-year period.

In support of their motion for summary disposition, the Respondents contend that, in February and March 2011, the facts necessary to support the allegations that Common Cause makes in the Complaint filed in this matter were “widely publicized.” Specifically, the Respondents point out the following:

- On February 1, 2011, an article appearing on [startribune.com](http://startribune.com) reported that the RPM “declined to release the amount raised or spent supporting Emmer’s recount effort. The party funded the operation through a specially created corporation—Count Them All Properly Inc.—that GOP spokesman Mark Drake said is not required to disclose its financial details.”<sup>23</sup>
- On February 1, 2011, an article appearing on [minnesotapublicradio.org](http://minnesotapublicradio.org) reported that RMP Chair Sutton “said today that the group created a separate corporate account, Count Them All Properly Inc., for their recount

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<sup>23</sup> Roper, Eric, “A \$25M race for governor,” (Feb. 1, 2011) (attached to Respondents’ Motion as Ex. 1) (see <http://www.startribune.com/politics/statelocal/115076859.html?refer=y>).

efforts. He said they won't disclose the amount of money raised or by whom—and state and federal laws don't require them to release it. That's counter to Sutton's past comments where he said they would run their recount funds through The Minnesota Republican Party."<sup>24</sup>

- On February 4, 2011, a posting on "Hot Dish Politics," the StarTribune blog, stated that, "This week, when campaign finance reports were filed, it became clear that the party decided to funnel funds through a separate corporation, Count Them All Properly, Inc. That corporation, set up less than a week before Republican Tom Emmer conceded the race, need not file any disclosure of donors."<sup>25</sup>
- On March 8, 2011, a posting on Hot Dish Politics," the StarTribune blog, stated that, "The bulk of the GOP recount costs, legal fees, were handled through a separate, specially created corporation called Count Them All Properly, Inc., which does not disclose its finances."<sup>26</sup>

The Respondents argue that the above reports made it clear that: (1) CTAP is a corporation; (2) the RPM and CTAP intended and agreed that CTAP would pay for legal expenses associated with the recount; and (3) CTAP handled the bulk of the GOP recount costs, which consisted of legal fees. According to the Respondents, a May 10, 2012, letter sent by Common Cause to Ramsey County Attorney John Choi provides further evidence that Common Cause knew of the intention of RPM to use CTAP to pay for recount expenses.<sup>27</sup> In that letter, Common Cause indicated that it had been looking into CTAP's financial activities "over the last several months," mentioned the February 1, 2011, MPR News report, and urged the County Attorney to work with the St. Paul Police Department to begin an investigation of [CTAP] for forgery and making an illegal in-kind contribution to a candidate and political party."<sup>28</sup> The Respondents assert that, whether or not Common Cause read the public reports, the information upon which it bases its Complaint was voluntarily disclosed and publicized by February 1, 2011 (or, at the very latest, by March 2011). Because the Complaint was not filed until July of 2012, the Respondents maintain that it is time-barred.

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<sup>24</sup> Scheck, Tom, "MNGOP won't disclose recount fundraising," (Feb. 1, 2011) (attached to Respondents' Motion as Ex. 2) (see [http://minnesota.publicradio.org/collections/special/columns/polinaut/archive/2011/02/mngop\\_wont\\_disc.shtml](http://minnesota.publicradio.org/collections/special/columns/polinaut/archive/2011/02/mngop_wont_disc.shtml)).

<sup>25</sup> Schrade, Brad, "GOP leaders: Won't commit to Dayton's call for disclosure," (Feb. 4, 2011) (attached to Respondents' Motion as Ex. 3) (see <http://www.startribune.com/politics/blogs/115319604.html>).

<sup>26</sup> Roper, Eric, "Parties saddled with post-election debt," (March 8, 2011) (attached to Respondents' Motion as Ex. 4) (see <http://www.startribune.com/politics/blogs/117614943.html>).

<sup>27</sup> The letter is attached as Exhibit 5 to the Respondents' Motion filed on August 15, 2012.

<sup>28</sup> *Id.*



## **Complainant's Response in Opposition to Motion**

In its Memorandum of Law in opposition to the Respondents' motions, Common Cause argues that its complaint was timely filed and the Respondents' motion must be denied. Common Cause provided a lengthy chronology in its memorandum of the events that occurred in connection with the 2010 recount, and attached supporting documents. In essence, Common Cause contends that the RPM actively concealed relevant information regarding CTAP's payment of legal fees for which RPM remained responsible; the limitations period was tolled as a result of the concealment; Common Cause could not have known or discovered the concealed corporate contributions until July 2012, when the Campaign Finance Board issued its decision and made the record in its proceeding public; and the Complaint was timely filed within one year after that discovery.

Prior to issuance of the Board's decision, Common Cause contends that it merely knew that the RPM had set up a separate corporation (CTAP) for the recount effort and that RPM maintained that CTAP was not required to disclose its finances. It maintains that these facts were insufficient to put it on notice that the payments made by CTAP violated section 211B.15, subd. 2. Common Cause asserts that the facts that gave rise to its Complaint center on CTAP's payment of legal bills that RPM was obligated to pay. It contends that the central fact at issue in this case is that RPM remained obligated to pay the law firms' bills, making the payments on those bills by CTAP an indirect corporate contribution to RPM. Based upon depositions taken during the Campaign Finance Board's investigation, Common Cause argues that the fact that RPM Chair Sutton required all invoices to go directly to him before they were "booked" was hidden, and the fact that RPM continued to have an obligation to pay legal fees was actively concealed from the RPM Treasurer, its Finance Director, and its entire Executive Committee. Common Cause maintains that it was not known until after Mr. Sutton's resignation on December 2, 2011, that he had acknowledged the RPM's indebtedness to Trimble & Associates by signing a written guarantee, and it was not possible for it to discover that Mr. Sutton had directed CTAP to pay the legal fees that he knew were the legal obligation of the RPM until the Board issued its decision and supporting materials in July 2012.

Common Cause maintains that the RPM, through Mr. Sutton and Mr. Puhl, "orchestrated a wave of misinformation, aimed at his own party's leadership, the Board, and at the public through statements to the press."<sup>29</sup> It contends that the statements upon which the Respondents rely were part of a "campaign" of misinformation:

The media articles relied upon in RPM's motion show only that RPM claimed to be doing what was allowed [under] an advisory put out by the Board: Establishing of a separate entity to conduct

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<sup>29</sup> Complainant's Memorandum of Law in Opposition to Motions at 10.

recount activities. Far from revealing the illegal activity the RPM claims [Common Cause] should have discovered, those news reports simply repeat the misinformation that CTAP was operating within parameters sanctioned by the Board. It was not, and [Common Cause] cannot be charged with knowing the full story even before RPM leadership.<sup>30</sup>

Common Cause argues that the mere suspicions that it expressed in its actions and letters prior to the date this Complaint was filed do not demonstrate that it knew all of the operative facts, and alleges that it did not discover the true extent of what had been concealed by the Respondents until after the Campaign Finance Board released its decision and supporting materials in July 2012. Accordingly, Common Cause argues that the one-year limitations period was tolled until July 13, 2012, and its Complaint was timely filed.

### **Respondents' Reply in Support of Motion**

In their Reply Brief, the Respondents acknowledged that Common Cause may not have learned all of the details supporting its claim until after the Board issued its Findings and Order on July 13, 2012. However, they contend that a party "need not know the details of the evidence establishing the cause of action, only that the cause of action exists."<sup>31</sup> The Respondents continue to argue that the limitations period was not tolled in this case because Common Cause knew or could have discovered through the exercise of reasonable diligence information sufficient to allege each element of its cause of action within the one-year period. They assert that it was widely reported in November 2010 that the RPM itself had hired attorneys Michael Toner, Tony Trimble, and Eric Magnuson to handle the recount and that there was no concealment of that fact.<sup>32</sup> They further contend that Common Cause should have known that the RPM incurred legal fees between November 3, 2010, and December 8, 2010, because there was broad media coverage of the activities of both parties' legal teams during that time. The Respondents also allege that Common Cause knew or was on notice that CTAP was not formed until shortly before the recount ended and could not itself have incurred the legal fees and costs for much of the work associated with the recount. Thus, when Minnesota Public Radio reported on February 1, 2012, that Mr. Sutton had said that the RPM had changed its mind and decided not to run their recount funds through the Party but instead through CTAP, the Respondents maintain that Common Cause was on notice that CTAP

<sup>30</sup> *Id.* at 10-11. The advisory to which Common Cause refers is the Board's Staff Advisory issued on November 4, 2010 (attached as Ex. C to Gerth Affidavit).

<sup>31</sup> Reply Brief at 3 (quoting *Hyrda-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 919 (Minn. 1990).

<sup>32</sup> Reply Brief at 6-7 (citing on-line reports in the St. Paul Business Journal (Nov. 3, 2010) (attached to Reply Brief as Ex. 1) ([see www.bizjournals.com/twincities/news/2010/11/03/Minnesota-gop-recruits-dc-attorney.html](http://www.bizjournals.com/twincities/news/2010/11/03/Minnesota-gop-recruits-dc-attorney.html)); MinnPost (Nov. 3, 2010) (attached to Reply Brief as Ex. 2) ([see www.minnpost.com/politics-policy/2010/11/gops-saber-rattling-tony-sutton-vows-aggressive-recount-fight](http://www.minnpost.com/politics-policy/2010/11/gops-saber-rattling-tony-sutton-vows-aggressive-recount-fight)); Minnesota Public Radio (Nov. 9, 2010) (attached to Reply Brief as Ex. 3) ([see www.minnesota.publicradio.org/display/web/2010/11/09/emmer-press-conference/](http://www.minnesota.publicradio.org/display/web/2010/11/09/emmer-press-conference/); and an RPM Press Release (Nov. 9, 2010) (attached to Reply Brief as Ex. 4) ([see www.mngop.com/news.asp?artid=499](http://www.mngop.com/news.asp?artid=499))).

would be paying the legal bills incurred during the recount from law firms the RPM had hired before CTAP was formed. Finally, the Respondents argue that there is no evidence that the Respondents engaged in affirmative acts of concealment within the meaning of Minn. Stat. § 211B.32.

### Panel's Analysis

As discussed during the August 16, 2012, conference call in this matter, the Respondents' motion relating to the untimeliness of the Complaint, although labeled a motion to dismiss, is more appropriately treated as one for summary disposition because matters outside the pleadings were presented for consideration.<sup>33</sup> In their motion, the Respondents relied on media reports and the May 10, 2012, letter to Mr. Choi, and attached these documents as exhibits to their motion papers. Accordingly, the Panel will review the motion relating to timeliness of the complaint as one for summary disposition.

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue of material fact and one party is entitled to judgment as a matter of law.<sup>34</sup> The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters.<sup>35</sup> A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case.<sup>36</sup>

The moving party has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case.<sup>37</sup> The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05.<sup>38</sup> The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial.<sup>39</sup> All doubts and factual inferences must be resolved against

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<sup>33</sup> *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 184-85 (Minn. 1999); *Cummings v. Koehnen*, 556 N.W.2d 586, 588 (Minn. App. 1996); Minn. R. Civ. P. 12 and 56.

<sup>34</sup> *Sauter v. Sauter*, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03.

<sup>35</sup> See Minn. R. 1400.6600.

<sup>36</sup> *Illinois Farmers Insurance Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978); *Highland Chateau v. Minnesota Department of Public Welfare*, 356 N.W.2d 804, 808 (Minn. App. 1984).

<sup>37</sup> *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Hunt v. IBM Mid-America Employees Federal*, 384 N.W.2d 853, 855 (Minn. 1986).

<sup>38</sup> *Id.*; *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 75 (Minn. App. 1988).

<sup>39</sup> *Carlisle*, 437 N.W.2d at 715 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)).

the moving party.<sup>40</sup> If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted.<sup>41</sup>

The question before the Panel is whether the Complaint was timely made within one-year of the alleged violation of Minn. Stat. § 211B.15. If the Complaint was not made within one-year from the time of the violation, the Panel must determine whether the Complainant has demonstrated that there are genuine issues of material fact concerning whether the Respondents engaged in fraud, concealment, or misrepresentation that could not be discovered during the one-year period.<sup>42</sup>

Section 211B.15, subdivision 2, prohibits a corporation from either making a contribution or offering or agreeing to make a contribution of money or a thing of monetary value to a major political party to promote or defeat the candidacy of an individual for election. Subdivision 13 prohibits aiding, abetting or advising the making of a prohibited contribution. While Common Cause could have chosen to base its complaint in this matter on allegations that the Respondents had offered or agreed to make a prohibited contribution, or had aided, abetted, or advised the making of a prohibited contribution, it did not choose to do so. Instead, Common Cause chose to base its Complaint on an alleged violation of the first prong of the statute, by asserting that CTAP actually made an improper contribution to the RPM when it paid for the attorney's fees incurred by the RPM, and the other Respondents had aided or abetted that contribution.<sup>43</sup> Under the circumstances, the Panel concludes that evidence that such a payment was made is necessary to establish the allegation made in this case, and is not merely a minor detail as alleged by the Respondents.

Based on the Board's Findings and supporting materials supplied by the Complainant, it appears that CTAP made two payments of \$9,000 to the firms associated with Tony Trimble and Michael Toner on April 16, 2011, and one payment of \$9,000 to the firm associated with Eric Magnuson on May 20, 2011.<sup>44</sup> It is clear that the Complaint was not filed by April 16, 2012, or May 20, 2012, within the one-year period after the alleged violations occurred. However, it appears that, prior to July 2012, CTAP did not register as a political party unit or file any report disclosing the payments it had made for the benefit of the RPM, and the RPM did not report the contribution from CTAP. This evidence supports the Complainant's claim that it could not have discovered through the exercise of reasonable diligence that the Respondents actually violated the statute by making or aiding/abetting a prohibited contribution until the Board issued its Findings and supporting materials on July 13, 2012.

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<sup>40</sup> See, e.g., *Celotex*, 477 U.S. at 325; *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988); *Greaton v. Enich*, 185 N.W.2d 876, 878 (Minn. 1971); *Thompson v. Campbell*, 845 F. Supp. 665, 672 (D. Minn. 1994).

<sup>41</sup> *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

<sup>42</sup> Minn. Stat. § 211B.15.

<sup>43</sup> See, e.g., Common Cause's Complaint at 4, 7-10

<sup>44</sup> Findings and Order of the Campaign Finance Board at 21 (July 13, 2012).

Viewing the facts in the light most favorable to the non-moving party, the Panel concludes that Common Cause has demonstrated that genuine issues of material fact exist regarding whether the failure to disclose the payments made and the contribution received, as well as other actions by the Respondents set forth in the Board's Findings and depositions taken by the Board, amount to concealment that tolled the limitations period. Accordingly, the Respondents' Motion for Summary Disposition on the timeliness issue must be denied.

The Respondents also argued that dismissal was warranted because Common Cause failed to explicitly plead the tolling of the limitations period in its Complaint. However, the Panel disagrees. The Complaint filed in this matter met the requirements of Chapter 211B by providing fair notice of the Complainant's allegations and setting forth facts that were found to be sufficient to support a *prima facie* violation of Minn. Stat. § 211B.15. As noted in the Notice of Determination of Prima Facie Violation, the Presiding Judge found that it appeared, based on the allegations in the Complaint, that the Complainant was arguing that Respondents' acts involved fraud, concealment or misrepresentation and that the limitations period should be waived.<sup>45</sup> Moreover, Common Cause asserted facts and arguments supporting tolling of the limitations period in response to the Respondents' motion raising this affirmative defense,<sup>46</sup> and the Panel has found those facts and arguments to be persuasive, as noted above.

## **II. Failure to State a Claim**

In their separate Motion to Dismiss, the Respondents argue that CTAP did not make a contribution to promote or defeat the candidacy of an individual for nomination, election, or appointment to a political office, within the meaning of Minn. Stat. § 211B.15, subd. 2, since the contributions made by CTAP for recount expenses were made *after* the election was held. Since 211B.15 is a penal statute, the Respondents contend that the statute must be narrowly construed. The Respondents point out that the Campaign Finance Board indicated in an Advisory Opinion issued on November 24, 2010, that "a contribution to a fund established to support a candidate's participation in a recount of ballots affecting that candidate's election should be, and hereby is, recognized as a non-campaign disbursement."<sup>47</sup> The Respondents assert that the contribution by CTAP represented a non-campaign disbursement which was

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<sup>45</sup> Notice of Determination of Prima Facie Violation and Notice of and Order for Probable Cause Hearing at 5 ((July 25, 2012).

<sup>46</sup> The Respondent cites *McGaa v. Glumack*, 441 N.W.2d 823 (Minn. App. 1989), in support of its argument. However, the Panel notes that the court in that case merely determined that entry of summary judgment based on the statute of limitations was appropriate where the plaintiff had not alleged any facts constituting fraudulent concealment *at the time of the summary judgment motion*. *Id.* at 825. See also Minn. R. Civ. P. 8.03 (statute of limitations is an affirmative defense). In the instant case, Common Cause asserted the appropriate facts in their response to the affirmative defense raised in the Respondents' Motion.

<sup>47</sup> Campaign Finance and Public Disclosure Board, Advisory Opinion 415 at 3 (Nov. 24, 2010) (attached to Motion).

not made to influence the election, and contend therefore that the Complaint fails to state grounds to support a violation of 211B.15, subd. 2.

In its memorandum in opposition to the motion, Common Cause argues that the Respondents' reliance on Advisory Opinion 415 is misplaced. First, the Complainant emphasizes that the Advisory Opinion merely addresses contributions *to* a recount fund, not the situation here in which contributions are made *from* a recount fund *to* a political party for payments of debts incurred by a political party during a recount. Second, the Complainant asserts that the Advisory Opinion did not address Minn. Stat. § 211B.15, but instead relates only to the requirements of Minn. Stat. § 211B.12, which governs the legal uses of money collected for "political purposes." Common Cause points out that the term "political purposes" as used in section 211B.12 is defined to encompass acts done to influence "voting at a primary or other election." In contrast, section 211B.15 contains a broader prohibition pertaining to any "contribution directly or indirectly . . . to promote or defeat the candidacy of an individual for nomination, election, or appointment to political office." The Complainant further argues that, by paying a portion of RPM's debt, CTAP freed up RPM to use its money that would otherwise have been paid to the law firms to influence the nomination or election of the party's candidates.

After careful consideration, the Panel finds, as a matter of law, that a corporation's payment of the legal expenses incurred by a political party during a recount constitutes an expenditure to promote or defeat the election of a candidate to a political office and thereby falls within the meaning of Minn. Stat. § 211B.15, subd. 2. Common Cause alleges that the legal expenses associated with the Complaint were incurred by the RPM to influence the election of the RPM's candidate to the governor's office during the 2010 election. The Complaint asserts that CTAP, a corporation, made a contribution by directly relieving the RPM of part of its debt for legal expenses incurred during the recount. As the Campaign Finance Board recognized in Advisory Opinion 415, the recount procedure represents part of the election process.<sup>48</sup> Moreover, recount activities clearly affect an election. With respect to the recount underlying this proceeding, it is alleged that a corporation made improper financial contributions to defeat Mark Dayton's candidacy for election as governor, within the meaning of section 211B.15, subd. 2.

Advisory Opinion 415 pertains to a different statutory provision that has a narrower reach. Moreover, the facts involved in Advisory Opinion 415 are inherently and substantially different than those alleged in the instant case. As a result, the Panel concludes that Advisory Opinion 415 does not compel a different result.

### **III. Mootness**

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<sup>48</sup> *Id.* at 2.

Finally, Respondents contend that this matter should be dismissed on the grounds of mootness because the Board's finding that CTAP is a political committee, together with the subsequent timely registration by CTAP as a political committee, renders the illegal corporate contribution allegation moot. In its response, Common Cause argues that CTAP's later registration with the Board does not moot its prior illegal activity or that of its officers, and contends that the alleged violations of 211B.15 remain "very much alive."

The Panel concludes that this motion lacks merit. CTAP's recent registration as a political committee does not resolve or render moot the issue raised by the Complainant regarding whether its payment of the legal bills on behalf of the RPM while it was a for-profit corporate entity in 2011 violated Minn. Stat. § 211B.15, subd. 2. CTAP's subsequent registration may address the reporting and disclosure violations of Chapter 10A that were found by the Campaign Finance Board, but it does not absolve CTAP of the alleged violation of Chapter 211B.

**B. L. N., R. C. L., C. L. S.**